

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2008

MARTIN CHARLES JONES v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Knox County
No. 75635 Kenneth F. Irvine, Jr., Judge

No. E2008-00520-CCA-R3-PC - Filed October 29, 2008

The petitioner, Martin Charles Jones, pled guilty to nine counts of criminal exposure to HIV, Class C felonies, and to three counts of statutory rape, Class E felonies. He received a total effective sentence of seventeen years to be served in the Tennessee Department of Correction. The petitioner's convictions and sentences were affirmed on appeal. *See State v. Martin Charles Jones*, No. E1999-01296-CCA-R3-CD, 2001 WL 30198 (Tenn. Crim. App. at Knoxville, Jan. 12, 2001), *perm. app. denied* (Tenn. Sept. 10, 2001). The petitioner now appeals the post-conviction court's denial of his petition for post-conviction relief and argues that he received ineffective assistance of counsel. Specifically, the petitioner argues that (1) counsel failed to order the petitioner to undergo a mental evaluation; (2) petitioner's guilty plea was unknowingly and involuntarily entered; and (3) his sentence violated his Sixth Amendment protections and the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004). Upon review of the record and the parties' briefs, the judgment of the post-conviction court denying post-conviction relief is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Albert J. Newman, Jr., Knoxville, Tennessee, for the appellant, Martin Charles Jones.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Patricia Cristil, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The facts of this case as summarized on direct appeal are as follows:

The [petitioner] was diagnosed by the Michigan Department of Public Health with human immunodeficiency virus in 1991. During 1997 and 1998, the [petitioner] engaged in sexual intercourse with Louise Hudson, Pamella Galli, and Angela Marie Day. Although he had been questioned about his medical condition by all three women at some point during each relationship, the [petitioner] never informed Hudson, Galli, or Day that he was HIV positive. The proof established, in fact, that he denied his HIV positive status to at least two of the three women.

At the time the [petitioner] was sexually involved with Hudson, the [petitioner] was thirty-five-years-old and Hudson was seventeen. The relationship between the [petitioner] and Hudson resulted in her contracting HIV. Hudson also became pregnant with the [petitioner]'s seventh child. . . .

Jones, 2001 WL 30198, at *1. The defendant filed a timely petition for post-conviction relief. Counsel was appointed and amended petitions were filed on January 13, 2005 and October 23, 2007. An evidentiary hearing was held on January 25, 2008.

The petitioner testified at the evidentiary hearing that he filed the initial petition for post-conviction relief himself. He recounted that trial counsel was appointed to represent him. The petitioner acknowledged that he pled guilty to multiple counts of criminal exposure to HIV and to statutory rape. He confirmed that he was diagnosed with HIV in 1991 and pled guilty to the charged offenses in 1999. During the intervening eight-year period, the petitioner received ongoing medical treatment, including several different prescription medications. The petitioner stated he took “about 20 different drugs . . . and some of them were experimental drugs. . . .” The petitioner asserted that he took the prescribed medications while he was incarcerated awaiting trial.

The petitioner alleged that prior to trial he only discussed his case with counsel one time. The petitioner acknowledged that counsel sent him copies of motions, pleadings, and other discovery materials. The petitioner recalled that he initially told counsel he wanted to argue that he could not be guilty because he was in denial about his illness. Later, the petitioner told counsel that his defense was that the victims knew of the petitioner's HIV-infected status and continued to have consensual sex with him. The petitioner stated that prior to trial, counsel tried to get the petitioner to agree to a guilty plea but he refused. The petitioner claimed that on the first day of trial, counsel was excited about the petitioner's prospects for success. The petitioner was unable to recall if any witnesses were called at the beginning of his trial. The petitioner recounted that on the second day, counsel told him that he had to “plead out” because the jury was against him. According to counsel, the state was preparing to call the victims to testify. The petitioner was granted a recess by the trial court. The petitioner met with counsel, his twin brother, his son, and his minister about the possibility of a plea. The petitioner acknowledged that he agreed to enter a guilty plea. However, he said he was upset and did not want to plead guilty.

The petitioner complained that counsel told him that the petitioner would only have to serve thirty percent of his sentence before becoming eligible for release. The petitioner stated that counsel told him he would receive a fifteen year sentence and would only have to serve thirty percent, or 3.7 years of that term. The petitioner recounted that he received a seventeen-year sentence. The petitioner further noted that he did not discover until after he was incarcerated that he would have to serve eighty-five percent of his sentence as a sexual offender.

The petitioner testified that during the entry of the guilty plea, the trial court was forced to stop several times because the petitioner was crying and could not maintain his composure. The petitioner stated that he felt that what he was doing was wrong. The petitioner stated that he was surprised when he received consecutive sentences. The petitioner claimed that counsel did not explain to him the difference between consecutive and concurrent sentencing. Furthermore, the petitioner complained that counsel spent his time working on a plea agreement and was not prepared to defend the petitioner at trial.

On cross-examination, the petitioner admitted that trial counsel met with him twice in addition to meeting with him for scheduled motions and hearings. The petitioner also acknowledged that counsel sent him pleadings and correspondence pertaining to his case. The petitioner acknowledged that during the trial, and during the year preceding his trial, he experienced difficulty with his medications which sometimes altered or diminished his mental competency. However the petitioner claimed that even though he “was in and out of it,” he could still remember what happened with regard to counsel’s representation of him at trial. The petitioner also emphasized that he did not knowingly and voluntarily agree to his guilty plea. However, he acknowledged that he indicated he understood the plea terms when explained by the trial court. The petitioner maintained that his guilty plea was the product of coercion and that his answers were not voluntarily or freely given. The petitioner admitted, however, that he never objected to counsel’s representation or informed the court that he had been coerced into pleading guilty. The petitioner also recalled that prior to the entry of the plea, he had spoken with the probation and parole officer and made a statement in which he apologized for his actions and admitted his guilt.

Trial counsel testified that he had been licensed in Tennessee for twelve years and was appointed to represent the petitioner. He recalled that he filed motions for discovery and hired a private investigator. He stated that he provided the petitioner with copies of all discovery materials he received. According to counsel, he spoke with the petitioner several times during his pre-trial incarceration, and visited him in jail on multiple occasions. He also enlisted the assistance of another attorney, Rick Clark, who volunteered his time. Counsel recounted that at each of his meetings with the petitioner, the petitioner understood what was discussed, despite taking multiple medications. Counsel stated that the petitioner wanted to use “denial” as a defense. Specifically, the petitioner wanted to argue that he could not be guilty of the charged offenses because he was in denial of his condition during the time he had sexual contact with the victims. Counsel informed the petitioner that “denial” was not a legally recognized defense. The petitioner then stated that the victims knew of his medical condition because they had seen the medications he was taking and consented to the sexual contact.

Counsel testified that Mr. Clark assisted him at trial. Counsel stated that he and Mr. Clark worked together on jury selection. After jury selection, the state called its first witness, a doctor who explained the medications the petitioner took to treat his HIV symptoms. Counsel stated that he and Mr. Clark evaluated the petitioner's case after the first day of trial. Because of the jury composition, the petitioner's theory of the case, and because the state was about to call the infected victims to testify, the two attorneys determined that the petitioner would likely receive the full sixty-year sentence if the petitioner's case proceeded. Counsel communicated his concern to the petitioner. The petitioner refused to agree to a guilty plea. Counsel obtained a recess from the trial court. During the recess, counsel worked together with the petitioner's family and his minister to persuade the petitioner to enter a guilty plea. After several hours of discussion, the petitioner agreed to the guilty plea. According to counsel, the petitioner was alert and inquisitive during this entire period and did not appear to be "in and out" due to his medications. Counsel reviewed the ramifications of the guilty plea with the petitioner and explained that because the petitioner was pleading "blind," he would receive a sentence determined by the trial court judge. Counsel recalled that during entry of the guilty plea, the petitioner was quite emotional and the trial court was forced to halt the plea several times to allow the petitioner to regain his composure.

On cross-examination, trial counsel testified that the theory of the case was that the victims should have known of the petitioner's condition because they saw the medication he was taking. Counsel recalled that the petitioner's case was the first case of its kind in Tennessee. Counsel stated that he reviewed the petitioner's medical records and spoke with a doctor to better understand the petitioner's condition. Counsel admitted that he did not file a motion to have the petitioner undergo a mental evaluation. Counsel reiterated that he and Mr. Clark evaluated the strength of the case after the first day of trial and determined that they would lose the case based upon the jury composition, their trial strategy, and the testimony of the victims. Counsel stated that as a tactical matter, he and Mr. Clark decided to move for a guilty plea before the victims testified. Counsel hoped that by sparing the victims the pain of testifying, the petitioner might receive leniency from the trial court. Counsel recalled that the petitioner had rejected a prior informal offer of fifteen years in confinement from the District Attorney General. Counsel denied that he had advised the petitioner that he would likely get fifteen years if he pled guilty. He confirmed that the petitioner made a statement at the guilty plea hearing and apologized to the victims.

On re-direct examination, counsel stated that he believed the petitioner was competent to stand trial. Counsel's assessment was based in part upon the petitioner's ability to discuss denial as a defense, as well as his ability to advance the theory that the petitioner was not guilty because the victims knew of his medical condition but consented to sexual contact.

The post-conviction court denied the petition for post-conviction relief by written order of February 14, 2008. The petitioner filed a timely notice of appeal.

II. ANALYSIS

A. Ineffective Assistance of Counsel

The petitioner first complains that he received the ineffective assistance of trial counsel. Specifically, the petitioner alleges that counsel should not have allowed him to plead guilty until he underwent a mental evaluation to determine if he was competent to enter a guilty plea.

In order for a petitioner to succeed on a post-conviction claim, he must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). A post-conviction court's findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). Once the petitioner proves that counsel's representation fell below a reasonable standard, the petitioner must also prove prejudice. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Both deficient performance and prejudice must be established to prove ineffective assistance of counsel. *Id.* at 697. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.*

Upon review of the record, we conclude that trial counsel was not ineffective in failing to order a mental evaluation of the petitioner. Counsel was not presented with any indication that the petitioner was incompetent or suffering from mental illness. The petitioner wanted to argue at trial that he should not be convicted because he was in denial about the severity of his illness. Counsel was unable to adopt the petitioner's "denial" defense. However, counsel said he was prepared to

argue that the petitioner was not guilty because the victims knew about the petitioner's medical condition and consented to the sexual contact. The post-conviction court, in denying the petition, recognized that the petitioner's ability to reason through his defense, as well as his expressed desire to spare the victims further pain by electing to plead guilty, was evidence of his competence to enter a guilty plea. "I think that that shows that you were – you had reasons for what you did, multiple reasons, and very logical, very intelligent, and very competent reason to go ahead and enter this plea." We conclude that the evidence does not preponderate against the post-conviction court's finding that trial counsel was not deficient for not ordering a mental evaluation of the petitioner. *See, e.g., Michael Williams v. State*, No. W2005-01810-CCA-R3-PC, 2006 WL 3371404, at *5 (Tenn. Crim. App., at Jackson, Nov. 20, 2006), *perm. app. denied* (Tenn. Mar. 19, 2007) (concluding that trial counsel was not deficient in failing to investigate the petitioner's mental capacity where counsel had no indication that the petitioner suffered from mental illness, and petitioner did not demonstrate otherwise). Therefore, the petitioner is without relief as to this issue.

Next, the petitioner claims that his guilty plea was unknowingly and involuntarily entered because he was emotional during his plea and because he experienced altered or diminished mental competency due to the medications he took to treat his HIV. In addition, the petitioner alleges that his plea was entered as a result of coercion by trial counsel.

A petitioner may successfully contest a conviction when his or her guilty plea is unknowing or involuntary. *See* Tenn. Code Ann. § 40-30-103; *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Wilson*, 31 S.W.3d 189, 194 (Tenn. 2002). A plea is not voluntary or knowing if it results from ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). In addition, a plea is not voluntary if the defendant, "is incompetent or otherwise not in control of his mental facilities' at the time the plea is entered." *Id.* (citations omitted). When determining the knowing and voluntary nature of the guilty plea, the court must look to various circumstantial factors including:

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Id. The standard is and remains "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). A petitioner's solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Upon review of the record, we note that prior to the entry of his guilty plea, counsel, along with family members and his minister, met with the petitioner over a period of several hours to discuss the possibility of a guilty plea. Counsel described how the plea would operate and discussed the ramifications of a “blind” guilty plea with the petitioner. Later, counsel explained to the petitioner how the sentencing hearing operated and who would testify. According to counsel, the petitioner appeared to comprehend everything that was explained to him and was “inquisitive” about the plea process. After several hours of deliberation with family, his minister and counsel, petitioner agreed to enter the guilty plea.

Counsel acknowledged that petitioner was emotional during the actual guilty plea process. However, the record reflects that the trial court took numerous recesses to allow the petitioner to regain his composure before proceeding. The record also reflects that beyond the bare assertion that he experienced altered or diminished mental competency during the deliberation and guilty plea process, there is no medical proof that the particular medications he took at the time he entered his guilty plea caused him to lose “control of his mental facilities.” See *Blankenship*, 858 S.W.2d at 904. The trial court determined that the petitioner’s guilty plea was knowing, intelligent and voluntary. Similarly, the post-conviction court accredited counsel’s testimony that the petitioner was not forced, coerced, or threatened to enter his guilty plea. During the plea colloquy, the petitioner informed the court that he understood the charges against him, that counsel had reviewed the facts of the case with him, and that he understood his right not to plead guilty. The petitioner also did not indicate that his plea was not freely or voluntarily made. Therefore, we conclude that the petitioner has failed to carry the burden of demonstrating that his plea was unknowing and involuntary. Accordingly, the petitioner is not entitled to relief as to this issue.

B. Sentencing

As his final issue, the petitioner asserts that he received an excessive sentence in violation of his Sixth Amendment protections and the holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington* 542 U.S. 296 (2004). The state contends that the petitioner has waived this argument by failing to present it on direct appeal.

Upon review of the record, we note that the petitioner was sentenced in 1999, one year before the United States Supreme Court’s decision in *Apprendi*, and five years before its decision in *Blakely*. Additionally, the petitioner’s direct appeal was finalized in 2001, more than three years before the rule of *Blakely* was announced. The petitioner argued on direct appeal that he was a suitable candidate for alternative sentencing or community corrections. We note that the petitioner did not argue on direct appeal that his sentence was excessive or imposed in violation of his Sixth Amendment rights. Furthermore, this court has held that *Blakely* may not be applied retroactively in a post-conviction setting to cases on collateral appeal. See *Jason D. Pillow v. State*, No. M2007-00490-CCA-R3-PC, 2008 WL 2521611, at *6 (Tenn. Crim. App., at Nashville, June 25, 2008); see also *Billy Merle Meeks v. Ricky J. Bell*, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486, at *7 (Tenn. Crim. App. at Nashville, Nov. 13, 2007), *perm. app. denied* (Tenn. April 7, 2008) (citing *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at

*2-3 (Tenn. Crim. App., Nashville, May 1, 2007); *Kenneth B. White v. State*, No. W2005-01499-CCA-R3-PC, 2006 WL 265103, at *3 (Tenn. Crim. App., at Jackson, Feb. 3, 2006); *James R.W. Reynolds v. State*, No. M2004-02254-CCA-R3-HC, 2005 WL 736715, at *2 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), *perm. app. denied* (Tenn. Oct. 10, 2005). Therefore, we conclude that the petitioner is not entitled to relief.

CONCLUSION

Following our review, we affirm the post-conviction court's denial of post-conviction relief.

J.C. McLIN, JUDGE